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TO: Dana AUSTIN FAX No.: _____

FROM: B. Donovan

SUBJECT: "Victory" Ships / EPA

PAGES SENT: 4 + COVER SHEET

DATE: 11/2/93

COMMENTS: Dana : For your info, attached
is my 10/22/93 cut
at a letter to EPA

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October 22, 1993

Bob Bates
Southwest Marine, Inc.
1300 Crystal Street, Ste 1709 South
Arlington, VA 22202

Re: Southwest Recycling -- "Victory" Ships/Letter To EPA

Dear Bob:

Enclosed is a draft letter that I propose for transmittal to Ms. Hardison, the Deputy Director of EPA. Please advise of the correct spelling of her name and title and mailing address.

Please review the draft to ensure that I have not stated anything that is inconsistent with the approach that SRI wants to take. In other words, is the goal to delay or scuttle totally MARAD's efforts to sell these ships for scrapping in foreign countries, or would SRI just as soon purchase for export itself, so long as it could be assured of some protection from the onerous requirements of the hazardous waste export laws? Also, as we discussed yesterday, I am not convinced that a "lawyer letter" is necessarily useful or required, as compared to a letter from Southwest Recycling itself. I leave that tactical decision to your judgment.

Very truly yours,


Brian J. Donovan

BJD:dl

CC:

Art Engel
Dan Cotter

DRAFT

October 22, 1993

Ms. Ann Hardison
Deputy Director
Environmental Protection Agency
Washington, D.C.

Re: Export of Hazardous Waste (Navy Ships)

Dear Ms. Hardison:

We represent Southwest Recycling, ("SRI") of Los Angeles (Terminal Island), California. SRI's business is dismantling and scrapping of vessels, including Navy combatant ships and other Government vessels.

My purpose in writing is to bring to your attention a position taken by the Department of Transportation, Maritime Administration ("MARAD") concerning export of hazardous waste as it relates to Government owned vessels. The position, described below, appears to be at odds with a fair reading of RCRA, but MARAD says that EPA is aware of and has not objected to that position. We request EPA's comments. If we hear nothing, SRI intends to follow MARAD's interpretation regarding export of hazardous materials. [would we?]

The MARAD position is stated in a letter dated October 15, 1993 (Exhibit 1), in response to questions posed by SRI on October 4, 1993 (Exhibit 2). The position is that MARAD is not exporting hazardous waste, and thus need not comply with 42 U.S.C. § 6938, when it sells vessels admittedly containing hazardous materials for the sole purpose of being scrapped in a foreign country. As you know, Section 6938 was incorporated into RCRA by the 1984 Amendments and places limitations and preconditions on export of hazardous waste.

In order to understand the basis of MARAD's position and SRI's concern, we offer the following brief summary of the underlying facts.

1. Background: MARAD Sale Of "Victory" Ships

The MARAD Invitation for Bid EXC-8629 dated 9/1/93 requested bids for up to 12 "Victory" ships. Exhibit 3 is relevant portions of the IFB including excerpts from the contemplated contract.

The IFB expressly required that the vessels be scrapped, and scrapping in "approved foreign countries" was expressly permitted. The Contract form expressly advised of the presence of hazardous materials and the need for compliance

Ms. Ann Hardison
October 22, 1993
Page 2

with environmental statutes and export licensing laws. See Exhibit 3, Articles 10 and 14.

It is well known that vessels of the age of these "Victory" ships contain large quantities of regulated substances, including asbestos, PCBs and other hazardous materials. [accurate, I assume?]

SRI was aware that 42 U.S.C. § 6938 prohibits export of hazardous waste unless stringent preconditions are met, or unless the United States has an agreement concerning hazardous waste with the Government of the receiving country. Since the economics of bidding for the scrap content of vessels is very heavily influenced by the cost of compliance with environmental regulations and laws, SRI posed questions concerning what it perceived as an apparent (potential) export of hazardous waste. Exhibit 2.

Late on October 15, 1993 received MARAD's reply, Exhibit 1. Concerning applicability of RCRA in general, MARAD stated its position to be that an obsolete vessel sold for scrap purposes is still a vessel and not "waste". Further, MARAD said that

"the materials on board the vessel are operating supplies. Some act other than the sale of the vessel is necessary before either the vessel or the operating supplies become waste and therefore governed by RCRA. The Environmental Protection Agency is aware of MARAD's position and rational and has not objected.

"... RCRA § 6938 applies only to the 'export' of hazardous waste. MARAD sells the vessels 'as is, where is.' Therefore MARAD sells the vessels in this country and it is the purchaser, not MARAD who is in fact the exporter. As the exporter it is the purchaser who must obtain the necessary export licenses and comply with all applicable laws and regulations, including RCRA § 6938." Emphasis Added.

2. MARAD Appears To Be An Exporter Of Hazardous Waste. At Least Within The Spirit And Intent Of RCRA

Section 6938 says that "no person shall export hazardous waste ..." unless there exists an "international agreement" between the United States and the receiving country concerning hazardous waste, or unless specific procedures are followed and consents obtained. These include notification to the EPA

Ms. Ann Hardison
October 22, 1993
Page 3

Administrator of the contemplated export followed by the Administrator's notification of the Secretary of State.

As you will note from MARAD's letter, they are relying on the 1990 amendment to 46 App. U.S. Code 1160(i), which specifically authorizes sales of these vessels for scrapping in foreign countries. But, we are not aware that that amendment repealed the prohibition of Section 6938.

MARAD's position (Exhibit 1), that the obsolete vessels are not themselves hazardous waste and that MARAD will not be "exporting" those vessels in any event, seems to exalt form over the essence and substance of what is occurring. A sale of a vessel for the exclusive purpose of export for dismantling into components which include hazardous material seems to us to be a violation of the spirit and intent of the statute, if not the exact words. The distinctions MARAD is making appear to be extremely fine to the point of being nonexistent. It seems to us that MARAD's sales of these vessels for export and scrapping are de facto exports of hazardous waste which require MARAD to comply with section 6938.

By extension of MARAD's logic, if SRI or any other contractor purchased these vessels from MARAD, and in turn contracted with a third party who would ultimately export the vessels for scrap purposes, then SRI would similarly not be the "exporter" and not be responsible for compliance with section 6938.

We would appreciate EPA's advice as to its position or comments relative to MARAD's contentions and the foregoing logical extension of MARAD's reasoning. Is MARAD's sale in these circumstances an export of hazardous waste or, as MARAD says, merely the sale of the vessel and nothing more, thus relieving the seller (MARAD, SRI or any other seller) of compliance with the law?

The response to this inquiry is of some urgency, as the solicitation is now pending, although SRI filed a protest with GAO because responses to our questions were not received by the date and time established for submission of bids. At this writing, we do not know if an award has been made nor do we know the exact status of the procurement.

Very truly yours,

Brian J. Donovan